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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL W. TURNER, Defendant and Appellant.	B205872 (Los Angeles County Super. Ct. No. NA044272)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joan Comparet-Cassani, Judge. Affirmed.

Caldwell Leslie & Proctor, Michael J. Proctor and Andrew Esbenshade for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Michael Turner was convicted, following a jury trial, of one count of arson of an inhabited building in violation of Penal Code[1] section 451, subdivision (b), one count of first degree burglary in violation of section 459 and one count of making terrorist threats in violation of section 422. The trial court sentenced appellant to a total term of 23 years, 4 months in state prison. Both the crimes and convictions occurred in 2000. Appellant appealed from the conviction, and also filed a petition for writ of habeas corpus. We denied the petition for writ of habeas corpus and affirmed the judgment of conviction.[2] The California Supreme Court denied appellant's subsequent petition for review. His claims involved ineffective assistance of counsel.

Following the United States Supreme Court's decision in *Cunningham* v. *California* (2007) 549 U.S. 270, appellant filed a petition for writ of habeas corpus in the trial court, contending that his sentence violated his rights as set forth in *Cunningham*. The trial court granted the petition, and in January 2008, resentenced appellant, this time to 22 years in state prison. Appellant appeals, contending that the trial court again erred in sentencing him. We affirm the judgment of conviction.

Facts

On March 8, 2000, 12-year-old T.C. shot a BB gun at appellant from an apartment on East Fourth Street. The shot hit appellant in the buttocks. Appellant threatened to kill T.C. He banged on and kicked the door to T.C.'s apartment. The three occupants of the building fled through another door. Fifteen minutes later, the apartment was on fire.

Appellant was seen walking away from the building about 10 minutes before the fire started. He returned to watch the fire. A fire-accelerant detection dog brought to the fire alerted to the presence of accelerant on appellant's hands and lower legs. Appellant's

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] We grant appellant's request that we augment the record on appeal to include excerpts of his trial, and on our own motion augment the record with the complete record of appellant's first sentencing hearing in this matter.

pants later testified positive for gasoline. Gasoline was found on debris taken from the apartment after the fire.

Discussion

Appellant contends that when the trial court resentenced him in 2008, the court erred in using his prior robbery conviction to impose the upper term for his current arson conviction and to impose a five-year enhancement term under section 667, subdivision (a).

Section 1170, subdivision (b) provides that "the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." The Rules of Court similarly state: "To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the enhancement and does so." (Rule 4.420(c).)

Here, the court explained its 2008 sentencing decision on the arson conviction as follows: "With respect to count 1, I still choose the high term of eight years. And my factor for choosing the high term of eight years is the defendant's rather lengthy criminal record which includes several escapes and robbery. And the strike which was proven causes the eight years to be doubled for a term of 16 years." Appellant objected that this amounted to a double or triple use of the prior conviction.

Assuming for the sake of argument that the trial court erred in considering appellant's prior robbery conviction as part of appellant's criminal history, we would find the error harmless.

Appellant's convictions, even apart from the robbery conviction, were numerous and his criminal history lengthy. Judge Comparet-Cassani, who sentenced appellant in 2008, was the judge who presided over appellant's 2000 trial and sentencing. The judge was thus well aware of appellant's criminal history as shown in his first trial.

At the court trial on appellant's prior convictions in 2000, the People introduced three exhibits. The first was fingerprints taken from appellant while in custody on this

case. People's Exhibit 2 was a seven-page packet from the State of Virginia, showing appellant's conviction for robbery. People's Exhibit 3 was a 33-page packet from the Federal Corrections Institute in Talladega, Alabama detailing appellant's federal criminal history. Both Exhibits 2 and 3 contained fingerprint cards. A fingerprint expert testified that those prints matched the ones she had taken from appellant in this case.

The federal records showed the following:

In 1981, a federal district court found that appellant was guilty of distribution of marijuana in violation of United States law, but was suitable for sentencing pursuant to the Federal Youth Corrections Act. Appellant was 20 years old at the time.

In 1982, a federal district court in West Virginia found that appellant had escaped from the custody of a federal correction institution. The court determined that the provisions of the Federal Youth Corrections Act did not apply to appellant, and imposed an 18-month term.

In 1983, a federal district court in Virginia found appellant guilty of escape by a prisoner in custody of the Attorney General. The court determined that appellant would not benefit from sentencing pursuant to the Federal Youth Corrections Act, and sentenced appellant to a three-year term.

In 1984, a federal district court in Virginia found that appellant had escaped from federal custody and sentenced appellant to a five-year term, later reduced to a nine-month term.

In 1986, appellant was released on parole. In 1987, a warrant was issued for appellant on a parole violation. He was ultimately returned to prison for this violation.

Also in 1987, a federal district court in Virginia found that appellant had escaped from the custody of the Attorney General and sentenced appellant to an 18-month term, suspended.

Appellant's six prior convictions are numerous under rule 4.421(b)(2). (*People* v. *Black* (2007) 41 Cal.4th 799, 818 [four convictions are numerous], citing *People* v. *Searle* (1989) 213 Cal.App.3d 1091, 1098 [three prior convictions are numerous].)

One aggravating factor is sufficient to support an upper-term sentencing choice. (*People* v. *Osband* (1996) 13 Cal.4th 622, 728.) Accordingly, we see no reasonable probability or possibility that appellant would have received a more favorable outcome if the trial court had not considered the prior robbery conviction.

We note that at appellant's original sentencing hearing in 2000, the trial court also found as aggravating factors that the arson was an act of great violence and that it involved the assistance of others to participate in that act. Although the trial court did not mention those factors at the 2008 resentencing, nothing about the underlying crime had changed, and those factors are still valid. They support, but are not necessary for, our conclusion that any error by the trial court in considering the prior robbery conviction was harmless.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.